IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE A.K.BASHEER

MONDAY, THE 19TH NOVEMBER 2007 / 28TH KARTHIKA 1929

WP(C).No. 26522 of 2004(G)

PETITIONER:

P.J. ROSAMMA, HSA, G.H.S. BALAL,
PARAPPA (VIA), KASARAGOD DISTRICT.

BY ADV. SRI.P.RAVINDRAN.

RESPONDENTS:
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1. **STATE OF KERALA, REPRESENTED BY ITS SECRETARY, GOVERNMENT EDUCATION DEPARTMENT, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.**

2. **DIRECTOR OF PUBLIC INSTRUCTIONS, THIRUVANANTHAPURAM.**

3. **DISTRICT EDUCATION OFFICER, KASARAGOD.**

<u>*ADDL. RESPONDENTS 4 TO 7 IMPLEADED:</u>

* 4. **O. GANGADHARAN, S/O. KUNHIRAMAN, AGED 51 YEARS, HIGH SCHOOL ASSISTANT (SOCIAL SCIENCE), GOVT. TEACHERS TRAINING INSTITUTE FOR MEN, KANNUR.**

* 5. **C. GOPALAN, S/O. OTHENAN, AGED 54 YEARS, HIGH SCHOOL ASSISTANT (MATHS), G.V.H.S. SCHOOL FOR GIRLS, KANNUR.**

W.P.(C). NO.26522/2004:

***6. A. VENUGOPALAN, S/O. ANANTHAN,**
AGED 51 YEARS, HIGH SCHOOL ASSISTANT (MATHS),
G.V.H.S. SCHOOL, KATHIRUR.

***7. K.P. VASANTHAKUMARI, W/O. K.K. BHASKARAN,**
AGED 52 YEARS, HIGH SCHOOL ASSISTANT (MATHS),
G.H.S. SCHOOL, PATYAM, PATHAYAKUNNU.

***ADDL. RESPONDENTS 4 TO 7 ARE IMPLEADED AS PER ORDER DATED 27/04/2007 IN I.A. NO. 4201/2007.**

BY SR. GOVERNMENT PLEADER SMT. M.R. SREELATHA,
ADV. SRI.T.G.RAJENDRAN,
ADV. SRI.V.A.MUHAMMED,
ADV. SRI.K.E.HAMZA.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 24/07/2007,ALONG WITH W.P.(C). NO. 20712/2006,THE COURT ON 19/11/2007 DELIVERED THE FOLLOWING:

W.P.(C). NO.26522/2004-G:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE CERTIFICATE SHOWING THE SERVICE DETAILS.

EXT.P.2: COPY OF THE CERTIFICATE OF ACCOUNT TEST (LOWER) CONDUCTED BY THE KPSC.

EXT.P.3: COPY OF THE CERTIFICATE OF KER CONDUCTED BY THE KPSC.

EXT.P.4: COPY OF THE ORDER DTD. 29/04/2003.

RESPONDENT'S EXHIBITS: NIL.

//TRUE COPY//

prv.

A.K. Basheer, J.

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W.P(C) Nos. 26522/2004 &
20712 of 2006

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Dated this the 19th day of November, 2007.

J U D G M E N T

Since a common issue arises for consideration in these writ petitions, they are being disposed of by this common judgment. Documents marked in W.P.NO.20712/2006 shall be referred to in the judgment hereafter.

2. Petitioners were working as High School Assistants. They have now retired from service pending the writ petitions. Their grievance is that they were denied promotion to the cadre of Headmaster/Assistant Educational Officer ignoring their eligibility. According to the petitioners, they had passed the requisite departmental tests as well as tests prescribed under the Kerala Education Act and Rules in 1999, 1990 and 1988 respectively. Several senior High school Assistants who had not passed the basic statutory departmental tests were promoted overlooking qualified teachers like the petitioners, on the ground that Government had granted relaxation to the senior teachers from passing the basic mandatory tests for promotion to the cadre of Headmaster. Petitioners therefore pray for a declaration that the exemption granted by the Government to the Senior High School Assistants from passing the departmental tests is arbitrary, illegal, ultra vires and violative of Article 14 of the Constitution. There is a further payer to issue a writ of mandamus to promote the petitioners to

the cadre of Headmaster on the basis of their eligibility to be promoted and to revert those unqualified Headmasters who have been promoted already.

3. Promotion to the post of Headmaster in Departmental High Schools is by transfer from the feeder category of graduate teachers and graduate language teachers. The post of Headmaster is borne in Kerala General Education Service. The qualifications for promotion to the post of Headmaster as prescribed under Rule 5 of the Kerala General Education Service Rules (for short the Rules) are as hereunder:

(i) A degree of a recognised University.

(ii) A degree in B.Ed/BT/LT

(iii) Must have passed Account Test (Lower)

and test in Kerala Education Act and Rules.

Rule 2(b) of the Rules postulates that the Director of Public Instruction who is the appointing authority has to prepare a select list of eligible candidates for promotion on the basis of merit, ability and seniority.

4. On April 29, 2003 the Government had issued Ext.P1 (G.O.Rt.1627/03/G.Edn.) wherein it was ordered, by invoking the powers conferred under Rule 39 of the KS & SSR, that High School Assistants who complete the age of 50 years in the next 3 years and those who have not passed the Account Test (Lower) and test in KER and who are otherwise qualified for promotion as Headmaster, will be exempted from passing the test. It was further directed that promotions already ordered prior to the circular of

Director of Public Instructions, will be allowed to stand in relaxation of the Rules for the above purpose, invoking the powers conferred under Rule 39 of KS & SSR.

5. It is the admitted position that the Government had extended the term of Ext.P1 order from time to time. Ext.P6 is stated to be the last order issued by the Government in this regard extending the period of Ext.P1 order for a further period of one year from August 29, 2006.

6. It is contended by the petitioners that only those High School Assistants who pass the obligatory departmental tests can aspire for promotion to the post of Headmaster/A.E.O. The departmental tests are being conducted regularly and therefore no aspirant can complain that he has not been given opportunity to acquire the obligatory qualifications. Rule 13B of Part II KS & SSR which deals with grant of permanent exemption to those who have completed the age of 50 years and have put in 25 years of service specifically forbids grant of exemption for passing the obligatory departmental tests as prescribed in the Special Rules. Therefore Ext.P1 order issued by the Government in exercise of the power under Rule 39 of KS & SSR is clearly illegal, arbitrary and vitiated. Such exercise of power is tantamount to giving a premium to violation of the statutory provisions and inefficiency in service. It is further contended by the petitioners that the power under Rule 39 can be used on very rare occasions in order to obviate unavoidable difficulty in a particular case. The Department was not justified in ignoring candidates like the petitioners who had

passed the obligatory departmental tests and had been waiting for their turn for promotion. The disastrous consequence of Ext.P1 order has been that a large number of unqualified High School Assistants have been occupying the post of Headmaster/AEO even though they have not acquired the obligatory test qualifications.

7. In the counter affidavit it is contended by the respondents that the Government is competent to issue orders on test qualifications granting relaxation thereof at any time as the situation may warrant. While issuing Ext.P1 order, the Government had kept in view the interests of large number of senior teachers of more than 50 years of age. The interests of those teachers who had not been able to acquire the departmental test qualification had to be safeguarded. It was therefore that the Government had invoked its power under Rule 39 of Part II KS & SSR. The representations received from several organizations of teachers had persuaded the Government to issue Ext.P1 order. It is further pointed out that petitioners in these cases would not have, under normal circumstances, got promotion since all of them were far below in the seniority list. Learned Government Pleader while defending the action of the Government has also attempted to place reliance on sub-clause (6) of Rule 28 Part II KS & SSR. But the contention raised by the learned Government Pleader appears to be prima facie untenable since the above clause may not have any application in the cases on hand.

8. The party respondents in these writ petitions have also adopted the same line of reasoning put forth by the official

respondents. It is further contended by these party respondents that promotion to the post of Headmaster had all long been made on the basis of merit, ability and seniority. In short, it is contended by the respondents that the petitioners who are juniors in the seniority list are not entitled to challenge Ext.P1 order issued by the Government, nor can they pray for a direction to promote them overlooking their seniors.

9. It is also contended by the party respondents that the decision of the Government to grant exemption from acquiring the test qualification prescribed in the Kerala Education Act and the Rules as well as the Account Test (Lower) conducted by the Kerala Public Service Commission has the sanction of law in view of the second proviso to Rule 44A Chapter XIX-A KER. It is pointed out by the learned counsel that the above proviso postulates that teachers who have attained the age of 50 years shall stand exempted permanently from acquiring the test qualification referred to above.

10. It is trite that exemption contemplated under Rule 13B of Part II KS & SSR does not take within its ambit the exemption from acquiring basic essential qualification to hold the post. As has been noticed already, Rule 5 of the Kerala General Education Service Rules stipulates that a High School Assistant, in order to be eligible for promotion to the post of Headmaster, must have passed Account Test (Lower) apart from the test under the Kerala Education Act and Rules. It is undoubtedly true that Rule 39 of the KS & SSR empowers the Government to deal with the

case of any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner as may appear to the Government to be just and equitable. The proviso to the above rule further provides that where such rules or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them, than that provided by those rules or orders. Thus it is clear that the Government can, in exercise of its discretionary power, grant exemption from the rigour of any rule while dealing with the case of a person or persons serving in a civil capacity under the Government of Kerala.

11. But the short question is whether exemption of a permanent nature and that too from acquiring the basic qualification to hold a promotional post can be granted by the Government as a matter of course, and that too on the basis of representations received from some organizations of the employees. In my view, the answer has to be in the negative. In fact Ext.P1 order was issued by the Government exercising the power under Rule 39 initially in the year 2003. The Government had thereafter extended the tenure of that order for a period of one year finally, with effect from August 29, 2006.

12. In the counter affidavit filed in W.P.No.20712/06 it has been stated by respondent No.1 that the Government had already addressed the Director of Public Instruction for draft proposal for amending the Rules in relation to the qualification so as to enable graduate teachers who complete 50 years of age to get permanent

exemption from passing Account Test (Lower) and the other tests under the KER. It is of course within the powers of the Government to bring in amendment to the Rules. But the action of the Government in passing executive orders granting exemption from passing basic eligibility tests to hold a post and that too in a casual manner, in order to please a section of the employees, will always be debatable and subject to scrutiny. Such action of the Government will be totally unjust to those teachers who have taken the pains to pass the test with the hope that they will be considered for promotion on acquisition of such basic qualifications. It will be a travesty of justice if those teachers are overlooked and their seniors are given promotion only on the basis of seniority.

13. Undoubtedly, acquisition of departmental qualifications enhances the eligibility and suitability. Therefore the above two important criteria for promotion cannot be given a go-by. Therefore the Government in fairness has to ensure that the power vested with it under Rule 39 is not used without any rhyme or reason, ignoring the heartburn of qualified and eligible High School Assistants who aspire for promotion. It has to be remembered that the Government should not be a party to encourage inefficiency. Government should also not encourage those who do not respect the rule of law and procedure. If the Government grants exemption without having regard to the statutory mandates thereby encouraging its employees to ignore the Rule relating to basic mandatory qualification, it will result in administrative inefficiency.

The Government shall take appropriate action in the matter keeping in view the directions contained herein above. In the peculiar facts and circumstances, particularly in view of the fact that petitioners have already retired from service, and also that their turn would not have come under normal circumstances since there were a large number of qualified seniors ahead of them, I am satisfied that petitioners are not entitled to get any relief in these writ petitions. Therefore the writ petitions are dismissed.

A.K. Basheer
Judge.

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